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No. 95-2077

In the Supreme Court of the United States

OCTOBER TERM, 1995

J.R. KOOG, SHERIFF, VAL VERDE COUNTY, TEXAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s), provides, *inter alia*, that, within five business days of a firearms dealer's proposal to transfer a handgun, the "chief law enforcement officer" (CLEO) (the chief of police or sheriff) of the transferee's residence shall make a "reasonable effort" to ascertain whether the transferee's receipt or possession of the handgun would be in violation of the law. Under the Act, the dealer may not make the transfer until five business days have elapsed after he provides such notice to the CLEO, unless the CLEO earlier informs the dealer that there is no legal impediment to the transfer. The Act also requires that the CLEO shall, upon request, provide the would-be purchaser with a written explanation of reasons for a conclusion that the transfer would be unlawful, and shall destroy records relating to the transfer upon a conclusion that no legal impediment to a handgun sale exists.

The question presented by the cross-petition is whether, if the Act's background-check, explanation, or record-destruction requirement violates the Tenth Amendment, that requirement is severable from the rest of the Act, including its provision for a five-day waiting period.

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1. On June 17, 1996, this Court granted the petitions for a writ of certiorari in *Printz* v. *United States*, No. 95-1478, and *Mack* v. *United States*, No. 95-1503. The question presented in those cases is whether the Brady Handgun Violence Prevention Act (Brady Act), 18 U.S.C. 922(s), contravenes the Tenth Amendment by requiring local chief law enforcement officers (CLEOs) to (a) make a "reasonable effort" within five business days to determine whether a proposed handgun transfer would violate the law; (b) provide a would-be handgun purchaser with a written explanation of reasons for the CLEO's conclusion that the transfer would be unlawful; and (c) destroy records relating to the transfer upon a conclusion

that no legal impediment to a handgun sale exists. On June 19, 1996, we filed a petition for a writ of certiorari in this case (No. 95-2052), seeking review of the Fifth Circuit's decision that those provisions are unconstitutional. We explain that the question presented in our petition is the same as the question presented in *Printz* and *Mack*, and we suggest that the Court hold our petition pending the decision in *Printz* and *Mack*. See 95-2052 Pet. 8.

The cross-petitioners agree that this case warrants review, but they ask that it be set for oral argument and consolidated with *Printz* and *Mack*. Cross-petitioners argue that the cases should be consolidated to ensure that this Court decides whether the provisions of the Brady Act challenged in *Printz* and *Mack* are severable from the remainder of the Act, especially the Act's five-day waiting period for transfers of handguns by federal firearms dealers. They contend that Congress would not have enacted the five-day waiting period without also requiring CLEOs to conduct a background check during those five days. Cross-Pet. 7-12. They also argue that the record-destruction and notice requirements are not severable from each other, or from the requirement that CLEOs make a reasonable effort to determine whether a handgun transfer would be illegal. *Id.* at 13-21.

2. The severability of the five-day waiting period from the interim duties imposed on CLEOs, including the reasonable-effort requirement, may not be properly before the Court in *Printz* and *Mack*, or in this case. The five-day waiting period is a duty imposed on firearms dealers, not CLEOs. See 18 U.S.C. 922(s)(1)(A)(ii)(I). Accordingly, cross-petitioners (who, like the petitioners in *Printz* and *Mack*, are

CLEOs, not firearms dealers) may lack standing to challenge the five-day waiting period because it does not affect them.

On the other hand, cross-petitioners, like the petitioners in *Printz* and *Mack*, have challenged three interim duties imposed on them by the Brady Act as violative of the Tenth Amendment, and have contended that those interim duties are not severable *from each other*. If the Court upholds all of the challenged provisions of the Brady Act in *Printz* and *Mack*, there will be no need to reach that severability question. But if the Court invalidates any of those three provisions, the Court may reach that question of severability. See *New York* v. *United States*, 505 U.S. 144, 186-187 (1992). Moreover, in this case, the court of appeals, which struck down all of the interim duties imposed on CLEOs (see 95-2052 Pet. App. 25a), considered the severability of the five-day waiting period as well, and held that it is severable from the interim duties (*id.* at 25a-28a).

Because this Court may reach the question of severability in *Printz* and *Mack*, we suggest that the Court hold the cross-petition (along with our petition) in this case pending the Court's decision in those cases. Consolidation of this case with *Printz* and *Mack* is not necessary, however, because the issues presented in this case will be fully briefed in *Printz* and *Mack*. There is every reason to expect that petitioners in *Printz* and *Mack* will present the question of severability in their briefs on the merits.*

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* Counsel for cross-petitioners in this case also represents Sheriff Printz.

For the foregoing reasons, the cross-petition for a writ of certiorari should be held pending the decision in *Printz* v. *United States*, cert. granted, No. 95-1478 (June 17, 1996), and *Mack* v. *United States*, cert. granted, No. 95-1503 (June 17, 1996), and then disposed of as appropriate in light of the decision in those cases.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

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